No. 2728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

BRIEF FOR APPELLEE, STRATHALBYN STEAMSHIP COMPANY AS BAILEE OF THE CARGO OF THE SS. "STRATHALBYN".

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Proctors for Appellee.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLEE, STRATHALBYN STEAMSHIP COMPANY AS BAILEE OF THE CARGO OF THE SS. "STRATHALBYN".

The brief of appellee and cross-appellant Strathalbyn Steamship Company, Limited, so thoroughly and ably

presents the question of the liability of the "Virginian" that we refrain from burdening the court with additional discussion on that point. We, therefore, adopt that portion of their brief, and submit respectfully that the decree condemning the "Virginian" should be affirmed.

THE "STRATHALBYN" IS NOT RELIEVED FROM ITS CONTRIBUTION TO THE "VIRGINIAN" BECAUSE OF THE PROVISIONS OF THE CHARTER PARTY.

The appellee and cross-appellant contends that the "Strathalbyn" is relieved from all liability to the cargo owner by a contract between it and the charterer exempting the "Strathalbyn" from damages arising out of a collision.

The innocent cargo owners' position in a case of mutual fault has been so often commented upon and is so thoroughly understood by this court that no good purpose would be served in burdening it with citations of the many cases in which their position is defined.

In

The Atlas, 93 U. S. 302, 23 L. Ed. 863, 7-8,

the Supreme Court said:

> "Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong; and the owners of the cargo may sue the owners of one of the ships, or both; * * * the court never intended to adopt a theory which would fail to give innocent parties full compensation suffered by a collision, and that they never meant to extend the moiety rule so as to do an injustice

> to an innocent tow, or to the owner of cargo. * * * Innocence entitles the loser to full compensation from the wrongdoer, * * *."

In this case the libel was filed against the "Virginian" by the Strathalbyn Steamship Company, Ltd., on behalf of the consignees and insurers of the cargo, and a decree against that vessel for the losses suffered by them was duly entered.

It is apparent, therefore, that if the decree condemning the "Virginian" be affirmed, the cargo owners and their underwriters have no interest in the question as to the obligation of the "Strathalbyn" to contribute its share of the cargo losses to the "Virginian".

We respectfully submit, however, that the "Strathalbyn" is not relieved from such duty of contribution by the provisions of the charter party.

The charter party, the contract mentioned by cross-appellant, was between the Strathalbyn Steamship Company, Limited, on behalf of the owners of the vessel, and the American Trading Company, the charterer. The cargo owners were not parties to it.

It is urged in the brief of cross-appellant that

> "the charter party exempts the 'Strathalbyn' from liability to the *charterer* for damage arising from the collision" (page 124).

But it is nowhere stated or claimed that the charter party exempts the "Strathalbyn" from liability to the innocent cargo owners or their underwriters for damages to cargo from collision, or any other cause.

In

The Maine, 161 Fed. 401,

upon which cross-appellant relies, the libelant contracted with a lighterage company for the transportation of his goods about New York Harbor. The contract, which was not in the form of a charter party, provided that in consideration of the low rate agreed upon, no underwriter claiming through the libelant was to have any claim upon the lighterage company, or upon any equipment or boats that they might charter or control. The libelant, the cargo owner, on behalf of the underwriters, filed a libel against both the "Maine" and the "Manhattan" for damages sustained because of a collision between the vessels. Both vessels were held in fault. The libel against the "Manhattan", however, was dismissed upon the ground that there was a contract between the *libelant* and the "Manhattan" relieving the latter from responsibility for such a loss. The court also held that the vessel was not a common carrier, and could, therefore, contract against its own negligence. It did not hold, however, that because the "Manhattan" was a private carrier it was relieved from liability. Upon the contrary, the decision is expressly placed upon the ground that the libelant had contracted away any right of recovery against the "Manhattan".

The case does not present, as does the one at bar, the question of the rights of the innocent cargo owners. There the libelant contracted away his rights to hold

the "Manhattan". The underwriter claiming under him was, of course, subrogated only to such rights as the libelant had. It, therefore, was in the same position as the cargo owner.

In this case the charterer may have contracted away his rights to proceed against the "Strathalbyn", but the consignees and insurers of the cargo aboard the "Strathalbyn" have not, by the charter party, so contracted.

The distinction between the two cases is apparent from the language of the court itself, where, in comparing the libelant to an innocent cargo owner, it said:

> "It was not a wrongdoer, but it had stipulated away its rights so far as the 'Manhattan' was concerned, *and cannot be deemed an innocent party.*"

The decree in this case is in favor of the bailee of the cargo for the "use and benefit of the owners and insurers of said cargo" (Ap., p. 1438). The charterer, the party to the charter party, is not therein mentioned and is not interested in it.

Conceding, therefore, everything that cross-appellant contends that *The Maine* decides, we respectfully submit that it does not lay down a rule which would support a holding that "innocent cargo owners and insurers of said cargo" had stipulated away their rights of recovery against the "Strathalbyn" because of a certain provision in the charter party to which they were not parties.

The case is no different, then, than the many in which the right to contribution has been upheld.

The Chattahoochee, 173 U. S. 540; 43 L. Ed. 801;
Erie Railroad Company v. Erie & Western Transportation Company, 204 U. S. 220; 51 L. Ed. 450.

The decree is against the "Virginian" for the full amount of the damages suffered by the innocent cargo owners. Such a decree is proper where the cargo owners proceed against one vessel and the two vessels in collision are held in fault.

The Atlas, supra;
The Beaconsfield, 158 U. S. 303; 39 L. Ed. 993.

The "Virginian", then, is not affected by the relation between the charterer or cargo owners or underwriters and the "Strathalbyn". Her owner's right to contribution is separate and distinct from that relation. It was so decided by the Supreme Court in

Erie Railroad Company v. Erie & Western Transportation Company, supra,

where the contention urged by cross-appellant was presented.

The court there said:

> "The liability of the New York, under our practice, for all the damage to cargo, was one of the consequences plainly to be foreseen, and, since the Conemaugh was answerable to the New York as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the New York could be held. Therefore the contract relations between the Conemaugh and her cargo have nothing to do with the case. See The Chatta-

> hoochee, supra. More specifically the last named vessel's liability to the New York is not affected by provisions in the Conemaugh's bills of lading, giving her the benefit of insurance, and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months."

A still stronger reason may be urged in support of the right of the "Virginian" to contribution. If we grant that the Harter Act is not applicable to the "Strathalbyn", the latter, of course, could not claim the benefits of section 3 of the Act, relieving a vessel, to which it is applicable, from errors in navigation. If, therefore, it be true that the Act did not apply to the "Strathalbyn", she remains liable for damages occasioned by errors in her navigation, unless she was relieved therefrom by her contract of carriage.

In other words, if the "Strathalbyn" should be deemed a private carrier, and the Harter Act be held not applicable to her, then her liability as such private carrier would be greater than that of a common carrier as against negligent navigation so far as any protection was afforded by the law. When, therefore, the Strathalbyn Steamship Company, Limited, as such private carrier provided by its contract against negligence in navigation, it was only taking unto itself the same protection as that accorded to a common carrier by the Harter Act.

This being true, granting that the Strathalbyn Steamship Company, Limited, was only a private carrier, its rights and liabilities as against the cargo owners, so far as the damages from the negligent collision were concerned, were identically the same as they would

have been against the cargo owners if the "Strathalbyn" had been a common carrier under the Harter Act.

But we have seen that under the settled rule of *The Chattahoochee,* the Harter Act does not relieve a vessel in fault for collision from contributing to the damages suffered by the other vessel, including the latter's recoupment of a moiety of the cargo losses of the first vessel. Equally, then, the private carrier, which, by reason of its special contract, stands in the same relation to the cargo owners so far as liability for losses from the collision are concerned, should fall within the scope of the rule in *The Chattoochee.*

We respectfully submit, therefore, that even on the theory advanced by appellee and cross-appellant as to the character of the "Strathalbyn" as a carrier, the "Virginian" is entitled to recoup one-half of the cargo losses as provided by the decree.

THE "STRATHALBYN" IS ALSO LIABLE TO THE INNOCENT CARGO OWNERS.

For the same reasons as previously mentioned, that is because the cargo owners and their underwriters are not parties to the charter party, and because the "Strathalbyn" is not protected by the Harter Act, the innocent cargo owners are not precluded from recovering their full damages from the "Strathalbyn".

If, therefore, the court should be of the opinion that the "Virginian" is not in fault, a decree, we submit, should be entered against the "Strathalbyn" awarding the cargo owners their full damages.

THE APPELLANT'S OBJECTIONS TO THE FORM OF DECREE ENTERED IN THESE CONSOLIDATED CAUSES IS WITHOUT MERIT.

The decree provides that the bailee of the cargo recover $8253.85, the cargo damages, from the "Virginian", and that execution for such amount issue. It also provides that before execution issues upon the amount decreed the Strathalbyn Steamship Company, Limited, there shall be deducted from such amount, to wit, $27,429.03, one-half of the cargo damage, viz., $4126.92; that execution on such deducted amount, $4126.92, be stayed (1) until the time of appeal expires; or (2), if an appeal intervenes, until the filing of the mandate, unless the appellate court should hold the "Virginian" free from fault. The decree further provides that upon the payment by the "Virginian" of the amount decreed the bailee of the cargo, to wit, $8253.85, execution in favor of the Strathalbyn Steamship Company, Limited, for the said deducted amount, to wit, $4126.92—one-half of the cargo damage—be perpetually stayed, or judgment satisfied.

It is apparent, therefore, that the "Virginian", because of the mutual fault of the vessels, is thus allowed to recoup from the "Strathalbyn" one-half of the cargo damage.

Three contingencies are thus provided for: The first need not be considered because an appeal was taken; so also with the second, because a decree from this court, relieving the "Virginian" from liability, would prevent the issuance of an execution against her; and the third, by paying the bailee of the cargo the whole of the cargo losses, to wit, $8253.85, execution for the

deducted amount of $4126.92 shall be perpetually stayed. The last contingency is the only one here presented for consideration.

By the decree the "Virginian" is liable to the Strathalbyn Steamship Company, Limited, for the amount decreed the latter, to wit, $27,429.03, less one-half of the cargo damage, viz., $4126.92, provided the owners of the "Virginian" pay the cargo damage to the bailee thereof promptly. It is thus clear that if the "Virginian" pays the amount of the cargo damage, execution in favor of the owner of the "Strathalbyn" for the deducted amount will be perpetually stayed. The sole purpose of that portion of the decree, then, is to enable the innocent cargo owners to recover, without delay, their damages in full, for the stays in execution provided for by the decree only operate as between the owner of the "Virginian" and the owner of the "Strathalbyn".

The sole objection of appellant to the decree is that it should not be compelled to pay the bailee of the cargo *promptly*. Inasmuch as this is the manifest effect of the decree, it cannot be regarded as unjust, for a decree that holds a vessel in fault cannot be said to be unjust because it is drawn so as to compel the owner of the vessel to promptly respond in damages for the losses suffered by the innocent cargo owners. If the owner of the "Virginian" obeys the mandate, assuming the decree will be affirmed, it can have no possible cause for complaint. Appellant concedes that fact (brief, p. 151), but it then urges, in effect, that it is "unjust" to *prohibit* it from *delaying* the payment of the amount decreed to the cargo owners.

Furthermore, the "Virginian" is given a right of contribution; that is, a right to deduct one-half of the cargo damage from the amount awarded to the "Strathalbyn" in the event that she (the "Virginian") pays the whole of the cargo damage. If she does not pay those damages, she is not in a position to claim contribution or recoup one-half thereof from the "Strathalbyn". The decree thus very carefully provides that the deduction shall be had if payment to the innocent cargo owners has been made.

The innocent cargo owner should be first paid. "He", says the Supreme Court,

> "* * * ought not to suffer loss by the desire of the court to do justice between the wrongdoers".
>
> *The Alabama* and
> *The Gamecock,* 92 U. S. 695; 23 L. Ed., at p. 764.

We respectfully submit, therefore, that whatever may be the view of this court as to the form which the decree ought to take, the innocent cargo owners should be protected in a prompt collection of their full damages, interest and costs. The latter should not be sacrificed to the convenience of the "Virginian".

THE APPELLANT'S OBJECTION TO THE ALLOWANCE OF INTEREST AND COSTS TO THE INNOCENT CARGO OWNERS IS ALSO WITHOUT MERIT.

The reason assigned in support of the objection to the allowance of interest and costs in favor of the cargo owners is that the bailee of the cargo caused an

independent libel to be filed against the "Virginian" for the losses suffered by its owners.

In the first place, we disagree with appellant's construction of the libel in cause No. 1036 of the records of the lower court. That libel is brought solely for the damages suffered by the owners of the "Strathalbyn".

The libel proceeds in part as follows:

> "The libel and complaint of Strathalbyn Steamship Company, Ltd., a corporation, owner of the steamship 'Strathalbyn', her tackle, apparel, furniture and boilers, against the steamship 'Virginian', her engines, boilers, tackle, apparel and furniture, and against all persons intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:"

Article 5, upon which appellant relies in support of its contention, then alleges:

> "That by reason of the collision and the careless and negligent acts and omissions aforesaid done and permitted on the part of the 'Virginian' libelant has suffered damage in the injury of said 'Strathalbyn' and the loss and damage of equipment, gear and property aboard of her, and by reason of the loss of the use of said vessel and the cost and expense of removing and replacing her cargo, and repairing the damage done thereto and to said vessel, her tackle, apparel and furniture and cargo in the sum of $160,000.00."

It is clear that the word "property" as therein used was not intended to cover the cargo.

It is apparent from the first portion of the libel that it was not brought on behalf of the cargo owners,

and we think it equally clear that article 5 does not set forth the damages suffered by the cargo owners.

If, instead of filing the libel in cause No. 1052 in the name of the bailee of the cargo, it was filed in the name of the cargo owners, appellant's objection would not for one minute be considered. Everyone would concede the cargo owners that privilege. The mere fact that the same libelant in two different capacities has appeared in two suits wherein it attempts to recover damages for two separate interests should not change the result.

Another reason for an independent libel on behalf of the cargo owners is made manifest when it is recalled that the Strathalbyn Steamship Company, Limited, as owner of the "Strathalbyn", is taking a position entirely opposed to the interest of the cargo owners. It denies all liability for the losses suffered by them. The necessity for independent action is therefore quite apparent.

The filing of the second libel has made a difference to appellant of one-half of the costs in favor of the cargo owners, to wit, $26. Because the court has awarded that sum to the cargo owners and against the appellant, and because they were compelled to put up another bond for the release of the "Virginian", appellant urges that the learned District Court has abused its discretion in awarding the cargo owners interest on their damages.

The question of interest on the damages, we submit, does not here arise, because even if the second libel

had not been filed, and damages were awarded to the cargo owners or to the Strathalbyn Steamship Company, Limited, as bailee of the cargo under the allegations of the libel in cause No. 1036, interest on those damages would have been decreed. In other words, the court, in the exercise of its discretion, would have properly awarded the cargo owners interest on their damages whether or not the second libel was filed.

The requirement of a second bond for the release of the "Virginian" was necessary. The bailee of the cargo, of course, was not in a position to judge the value of the cargo nor the extent of the damages. It was bound to obtain adequate security for the cargo owners, having in view all of the possible damages which might result from a forced sale of the cargo, or from its transportation after being wet by salt water, on a long voyage through changing climatic conditions. Furthermore, if it thought that the bond was excessive, the remedy of the appellant would have been to ask that it be reduced.

The Alaska, 23 Fed. 597, at p. 615.

The lower court awarded interest on the damages suffered by the cargo owners and such action does not appear to have been an abuse of discretion. And under the familiar rule, announced so frequently by this court, such an award should not be reversed unless there be a manifest abuse of discretion in the action of the lower court.

The innocent cargo owners are entitled to their damages in full, without regard to the division of

costs as between the two vessels in fault, and the decree awarding the cargo owners interest and costs should, therefore, be affirmed.

In conclusion, we submit that the innocent cargo owners and their underwriters are entitled to their full damages from one or both of the vessels.

As said by the Supreme Court, in speaking of the cargo owner in cases of collision:

> "He ought not to suffer loss by the desire of the court to do justice between the wrong-doers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties."
>
> *The Alabama* and *The Gamecock,* supra.

We respectfully submit, therefore, that the decree be, in all respects, affirmed.

Dated, San Francisco,
March 4, 1916.

Respectfully submitted,

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